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No. 04-209

IN THE

Supreme Court of the United States

KAROL K. HOWARD, PETITIONER

v.

COLUMBIA PUBLIC SCHOOL DISTRICT, JAMES R. RITTER, AND CHERYL COZETTE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS' IN OPPOSITION

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QUESTIONS PRESENTED

I. May the petitioner present in her Petition for Writ of Certiorari issues and argument not preserved in the District Court or Court of Appeals?

II. Whether the United States Court of Appeals for the Eighth Circuit properly affirmed the District Court's grant of summary judgment where the petitioner failed to present any evidence establishing that her "protected speech" was a factor in the employment decisions at issue?

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JURISDICTIONAL STATEMENT

Respondents agree with petitioner that jurisdiction in this Court could be founded on 28 U.S.C. § 1254 if the appropriate facts and circumstances were present. This case, however, presents none of the compelling circumstances that could warrant a writ of certiorari as required by this Court's Rule 10. Therefore, this Court should exercise its discretion to deny the relief requested by petitioner.

STATEMENT OF THE CASE

Petitioner Karol Howard has presented to this Court, as she did in the courts below, a version of the facts based largely on misrepresentations of the record, exaggerations, speculation, and unwarranted inferential leaps. Contrary to Howard's assertions, the lower courts did not erroneously characterize the record or ignore relevant evidence. Rather, as indicated by the District Court's Order and the Eighth Circuit's opinion, neither court found Howard's characterization of many salient facts to be accurate or supported by inferences that can be reasonably drawn from the record.

Very briefly, Howard was hired by the Columbia Public School District ("CPS") in 1998, and was assigned to serve as principal at Robert E. Lee Elementary School ("Lee"). During her two years at Lee, Howard reported to defendant Dr. Cheryl Cozette, the Assistant Superintendent for Elementary Education. Cozette, in turn, reported to defendant Dr. James Ritter, CPS's Superintendent.

During the 1999-2000 school year, as part of the CPS's increasing emphasis on the importance of literacy and school improvement, Ritter, Cozette and the Board of Education implemented a district-wide Literacy Plan and School Improvement Program, and took other measures to help struggling students throughout the District. These were initiatives by the District that Howard, as part of her job as principal, was supposed to help implement effectively. Cozette and Ritter routinely discussed with principals the resources available to improve the achievement of minority, disadvantaged and special needs students, and principals regularly spoke to Cozette and Ritter about staffing needs and achievement of minority, disadvantaged and special needs children.

While these initiatives were in the process of being implemented, Howard told Cozette that she was having trouble working with two first grade teachers on literacy and school improvement. Based on Howard's representations, Cozette and Ritter thought these were isolated issues and that most of the Lee faculty supported Howard. By late May 2000, however, it became clear that the problems at Lee were much broader than Howard had represented, that there were tensions and low morale at Lee, and that serious questions were being raised from a variety of sources about Howard's communication and leadership skills and abilities. After investigating the multiple concerns that were being expressed, Cozette and Ritter concluded it would not be in the best interests of the students, teachers, others in the Lee community or Howard herself for Howard to continue in her assignment at Lee for the 2000-2001 school year.

While at Lee, Howard had drafted several successful grant applications and had indicated an interest in analyzing student test data. Given the District's emphasis on school improvement and literacy programs, CPS needed assistance in interpreting assessment data and helping schools utilize it. Cozette and Ritter believed Howard could be successful in these areas on a district-wide level.

Accordingly, Ritter and Cozette met with Howard on July 11, 2000, and explained that they did not think she could be successful at Lee, given the scope of the concerns that existed about her leadership, communications skills and management style. Howard did not deny that there were serious problems between her and the Lee faculty, nor did she claim they were the result of her speech. Ritter then discussed with Howard the new district-wide assignment CPS was offering. He explained that he believed she could be successful in this assignment, which involved analyzing test and literacy data being generated as part of the District's literacy initiatives, and assisting building principals with grant writing. During the meeting, Howard indicated that she would transfer to the district-wide position and did not object to the reassignment. She asked only if she could take some vacation time and where she was to report.

Howard reported to her new district-wide assignment for three days and then returned to Lee and "sat in" the office for several days. She told the District's Deputy Superintendent that she was not happy with her new position and that her attorney told her to sit at Lee. The District placed her on paid administrative leave until the parties could agree on an

alternate assignment. Following negotiations between Howard and her attorney and CPS and its attorney, Howard was placed in a position specially created for her for the 2000-2001 school year as a Principal on Special Assignment at the school of her choice, Blue Ridge Elementary, where she received the same salary and benefits she would have received at Lee. That was the only year, before or since, that Blue Ridge has had three full-time administrators. Among other things, Howard also negotiated for and received paid time off to look for employment outside the District.

In April 2001, in accordance with applicable Missouri law, Howard was timely notified that the position specially created for her at Blue Ridge for the 2000-2001 school year would be eliminated the following year, and that her one-year contract with the District was being non-renewed. That notice in no way prevented her from applying for other positions with the District, and she did apply for several positions for which she was considered but not selected by the respective selection committees, because they did not find her to be the best qualified candidate. The teachers at Lee had no role in the decisions not to select her for other positions and not to renew her contract with the District.

Respondents will not attempt to address all the misrepresentations of the facts and the record in petitioner's statement of the case. By way of illustration, however, the following are some examples.

Howard did not receive "excellent performance evaluations" as she states in her petition; rather, she was rated as "meets expectations" on most of the

evaluation criteria. In contrast, she evaluated the teachers she now attacks and accuses of bias as "exemplary professionals" and gave them excellent performance evaluations. She never mentioned any discrimination in any teacher's performance evaluation; she never counseled, disciplined or spoke to teachers about alleged discrimination. She never counseled or disciplined any teacher for excluding students from class. She counseled only one teacher about excluding special needs students from field trips and said nothing about excluding minority or disadvantaged students from class or field trips.

Lee is one of CPS's smaller elementary schools, and has since 1991 been an "expressive arts" school. Howard's background and teaching experience was as a band teacher, and that is one of the reasons she was selected for the position at Lee. Like other elementary schools in the District, Lee serves a particular attendance area. However, because of Lee's focus on the arts, it has often had a waiting list of students from outside the attendance area who wish to attend as "special permission" students. There is no evidence in the record that special permission students are or were necessarily Caucasian, as Howard indicates. Moreover, contrary to Howard's assertion, the demographics at Lee did **not** change dramatically in the 1999-2000 school year. Although Lee does not (and did not) have one of the highest percentages of minority/disadvantaged students in the district, the student population at Lee has, for many years, been diverse, with a significant percentage of African-American students, international

students[1], economically disadvantaged students and some special needs students. That did not change in any material way while Howard was there. The teachers Howard now denigrates and accuses of discrimination have chosen to teach at Lee for many years, and were familiar with that student population.

Howard was not "demoted" when she was reassigned to the district-wide position. She was never told she was being demoted; Ritter and Cozette never told anyone she was demoted and the reassignment to a district-wide position was not viewed as a demotion. To the contrary, that position was at or above the level of a building principal, had the same salary and benefits, the same number of work days and still involved reporting to an Assistant Superintendent.

The Lee teachers Howard now seeks to discredit were by no means the only ones who expressed concerns about Howard's leadership and communications skills. Among other things, seventeen Lee faculty members (including 11 of the full-time classroom teachers) sent Ritter a letter dated June 10, 2000, expressing serious concerns about Howard's leadership and asking him to intervene to address the difficult working environment at Lee. One teacher sent a letter dated May 30, 2000, advising the District that she was resigning due to plaintiff's poor leadership and communication skills. Theresa Vandover, an

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[1] The University of Missouri's main campus is located in Columbia, and the children of a number of graduate students from other countries live in the Lee attendance area. Indeed, this group of students from well-educated families comprise part of the group Howard describes as "economically disadvantaged."

experienced principal at another elementary school who was assigned as Howard's mentor, told Cozette she had serious concerns about Howard's leadership, that her communication skills were a concern, and that Howard needed more help than she as a mentor could provide. Dr. Monica Beglau, a school improvement consultant who was brought in by Howard to assist in developing a school improvement plan for Lee, shared with Cozette her observations that Howard was unable to communicate effectively with the teachers, and did not have the leadership, communication or problem-solving skills necessary for her position at Lee. Dr. Sharon Hoge, Language Arts Coordinator for the District, told Cozette in May 2000 that she had concerns about the atmosphere at Lee and about Howard's leadership. Ritter and Cozette also received letters from the Lee PTA President and two other Lee parents expressing their concern about Howard's communication and leadership skills and the morale at Lee, and Cozette talked with the PTA President about her letter and the isues.[2] (See App. pp. 26-28.)

Howard did not tell Cozette there were problems with minority children. Rather, Howard claimed during her deposition that when she spoke to Cozette about "Lee students," she was including minority, special needs and disadvantaged students

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[2] Howard's statement that the teachers initiated and/or were responsible for the parent letters is flatly contradicted by the record and the sworn statements of the parents to the contrary. During her investigation of the matter, Cozette also talked to some Lee staff members who supported Howard, none of whom were full-time classroom teachers at Lee.

even though she did not specifically mention those groups. (See App. at 8.)

The teachers at Blue Ridge did not advise Ritter and Cozette in their letter of support or otherwise that they wanted Howard to be principal at Blue Ridge as Howard claims. Rather, after another candidate had been selected for the position of principal and after Howard had received her notice of non-renewal, a number of Blue Ridge staff signed a letter expressing their appreciation of Howard's work. Both the retiring principal and the assistant principal at Blue Ridge told the District's Human Resources Director during the selection process that they did not think Howard would be good for the principal position at Blue Ridge.

Howard did not talk about discrimination against minority students or suggest that her speech was a factor in the concerns expressed about by others about her leadership and communication skills and the atmosphere at Lee during any of her meetings with Cozette while Cozette was investigating the situation in June 2000, nor did Howard make any reference to these issues in her June 18, 2000 letter to Ritter.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed to Preserve the Causation Argument She Now Attempts to Present in her Petition for Writ of Certiorari, and Her Causation Argument is not Supported by the Record; Therefore, the Eighth Circuit did not Address the Argument in its Decision and its Opinion is not in Conflict With Decisions of Other Circuits.

This case simply does not present the issues that Howard claims warrant certiorari. Howard did not properly raise or preserve the first question as to which she seeks review. Not only did Howard completely fail to present this (or any) argument as a basis for establishing the causation element of her First Amendment claim before the District Court, she did not properly raise or present this issue before the Eighth Circuit Court of Appeals.

Even if Howard had presented this question and it were properly before this Court, the Eighth Circuit's decision is not in direct conflict with decisions of other circuits as Howard erroneously contends. It was not necessary for the Court of Appeals even to address the issue because the record does not support the factual premises on which Howard bases the question she now seeks to present. This is not a case in which there is any direct evidence of discriminatory animus based on Howard's speech, nor is there circumstantial evidence from which any such inference can reasonably be drawn. Rather, Howard's claim rests on speculation, surmise and unjustified inferences presented here as established facts. Both the District Court and the

Eighth Circuit correctly held that Howard wholly failed as a matter of law to present evidence establishing that her speech was a substantial or motivating factor in the employment decisions about which she complains.

A. The First Question Presented by Howard is Not Properly Before this Court for Review.

Howard submits to this Court that teachers at Lee School were biased against her because of her exercise of free speech, and that these allegedly biased subordinates, while having no decision-making authority, exercised substantial influence over the actual decision makers. Based on these factual assertions, Howard asks whether the alleged bias of the teachers can be imputed to the formal decision makers for purposes of imposing liability. Howard has, however, procedurally waived her right to present this issue to the Court.

Howard did not raise this legal issue before the District Court in her Suggestions in Opposition to Defendants' Motion for Summary Judgment or otherwise. In fact, Howard failed even to address the causation prong of her First Amendment claim in her response in opposition to defendants' motion. (See App. at 24.) Rather, she argued only that she had engaged in protected speech (an issue which the courts below assumed for purposes of the motion, but did not decide). Nevertheless, the District Court carefully reviewed the voluminous record and held that, as a matter of law, "no reasonable jury could conclude that Howard's speech was a substantial or motivating factor in the [Columbia Public School] District's decision[s]. . .." (App. at 28.)

The District Court granted summary judgment in favor of respondents on all counts and claims.

In her main brief on appeal to the Eighth Circuit, Howard did not present in her statement of issues or otherwise address the legal question she now asks this Court to consider. She cited none of the cases on which she now purports to rely. Rather, Howard merely asserted that she had presented "substantial evidence to prove causation," which she accused the District Court of "disregarding." The gravamen of Howard's argument was that she had provided information about her speech to defendants Ritter and Cozette, that **they** were the ones with the alleged improper motivation, and that they made their employment decisions in retaliation for her protected speech.

In their brief in response in the Court of Appeals, respondents demonstrated why Howard had not accurately characterized the record, why the record did not, in fact, support Howard's conclusory assertion that Ritter and Cozette's actions were motivated by an intent to retaliate against her for her alleged speech, and why the District Court had correctly held that, as a matter of law, she had failed to establish causation. Indeed, the "protected speech" in which Howard claimed to have engaged concerned precisely the same issues Ritter, Cozette and CPS were emphasizing, and the plans and initiatives they were in the process of implementing throughout the District in an effort to improve literacy and achievement for all students.

In her reply brief, Howard still did not squarely raise the first issue she now seeks to present to this

Court. She did, however, very briefly argue a point that is marginally related to the legal issue in her question presented. Howard flatly asserted, without support or explanation, "There is evidence some teachers did not like Howard's speech." Then, heaping inference on assumption, she baldly labeled any interpersonal friction that existed at Lee as "inextricably linked" with her "protected speech," stating that it could not, therefore, justify any adverse employment action. She made no attempt to support any of these conclusory pronouncements by relating them to any evidence supported by the record, nor could she have done so. Howard merely presented as a "given" her speculation that any complaints made about her by Lee teachers must have been motivated by her speech, rather than by the many concerns expressed about her leadership abilities and communication style, not only by Lee teachers, but also by various administrators, parents and others. Howard did, however, cite several Eighth Circuit cases, which she also cites in her petition to this Court, although not in connection with her argument on this question. Rather she now cites these cases in support of her argument for the second question she purports to present for review.[3] Howard never squarely presented to the

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[3] Ironically, the cases she cited in her reply brief indicate that, in determining whether a plaintiff has made a submissible case on the issue of causation in a First Amendment case, the Eighth Circuit will consider whether reports from subordinates of antagonism and interpersonal friction can be directly or "inextricably" linked to a plaintiff having engaged in protected conduct, where (unlike the present case) such assertions are supported by evidence on the record. *See, e.g., Stever v. Independent School District*, 943 F.2d 845 (8th Cir. 1991); *Roberts v. Van Buren Public Schools*,773 F.2d 949(8th Cir. 1985).

appellate court the issue she now asserts, nor did she cite any of the cases from other circuits on which she now seeks to base her claim of a conflict among the circuits.

After a panel of the Eighth Circuit unanimously affirmed the District Court's grant of summary judgment, Howard filed a Petition for Rehearing with Suggestions for Rehearing En Banc, in which she raised six challenges (some with multiple subparts) to the Eighth Circuit's decision. Howard did not raise this question or suggest that the Eighth Circuit's decision created a conflict among the circuits in her petition for rehearing. Her petition was denied.

The Eighth Circuit has repeatedly held that claims not raised in an initial brief are generally deemed waived. *See, e.g., XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1026 n.3 (8th Cir. 2004) (finding that it would not be appropriate to address an argument that appellant did not raise in the District Court, did not raise in its main appeal brief but raised for the first time in its reply brief); *Cavegn v. Twin City Pipe Trades Pension Plan*, 333 F.3d 879, 882 n. 2 (8th Cir. 2003) (declining to address an argument raised for the first time in a reply brief); *Mahaney v. Warren County*, 206 F.3d 770, 771 n.2 (8th Cir. 2000) ("Claims not raised in the initial brief are waived.")(per curiam); *State Auto. Mut. Ins. Co. v. Mitchell*, 179 F.3d 590, 592 (8th Cir. 1999) ("We generally do not address issues and arguments asserted for the first time in a reply brief.").

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970), this Court stated that "where issues are

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." Moreover, this Court has repeatedly held that "it is only in exceptional cases coming here from the federal court that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). *See also Youakim v. Miller*, 425 U.S. 231, 235 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958) (declining to address an issue "not raised in the Court of Appeals").

Thus, even if the argument presented in Howard's reply brief could be broadly construed as raising the first legal question Howard seeks to present to this Court, it was not properly raised in the court below, or addressed by the Eighth Circuit in its opinion. It is therefore not properly before this Court.

B. The Eight Circuit's Decision is Not in Direct Conflict with The Decisions of Other Circuit Courts

Howard cites Third, Fourth, Sixth, Ninth and Tenth Circuit cases for the proposition that a plaintiff can demonstrate causation by producing evidence that the actual decision maker was influenced by subordinate employees who took offense at the content of plaintiff's speech. She states that the Eighth Circuit's decision is in direct conflict with these decisions. It is not.

Even if the question presented were properly before this Court, Howard's claim that the Eighth

Circuit's decision "creates a conflict between the Eighth Circuit and most other circuits that have considered this issue" (*id.* at 16) is patently incorrect. The Eighth Circuit did not address this theory of causation one way or the other in its opinion, and its silence on the issue in the circumstances of this case certainly does not create a conflict between the Eighth Circuit and other circuits. It merely reflects that, as set forth above, the question was not properly raised or presented as an issue on appeal, and further, that the factual premises on which Howard attempts to base this belatedly-raised argument are simply not supported by the evidence.

In cases where a plaintiff properly presents the issue and the record supports plaintiff's claim (see p. __ and fn 3 *supra*), the Eighth Circuit has considered whether complaints from subordinates are sufficiently linked to the plaintiff's protected activity to create an issue for the jury on whether such activity was a substantial or motivating factor in the challenged decision. *See, e.g., Stever v. Independent School Dist. no. 625*, 943 F.2d 845, 853 (8th Cir. 1991)(if deterioration in interpersonal relationships with other staff members was caused by plaintiff's protected speech, that deterioration cannot justify an adverse employment action if it is inextricably linked to the protected speech); *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 958 (8th Cir. 1985)(decline in plaintiff's evaluations could not be used to justify her dismissal if lower scores could be traced to supervisor's disapproval of plaintiff's union activities); *Patterson v. Masem*, 774 F.2d 251, 256 (8th Cir. 1985) (plaintiff's perceived lack of interpersonal skills due to abrasiveness and antagonism she engendered among peers could not be legitimate factor

justifying refusal to promote if peer's antagonism resulted from their disagreement with plaintiff's civil rights activism).

In the present case, Howard's argument on the causation issue rests on purported factual assertions that are based largely on misrepresentations, exaggeration, speculation and, as the Eighth Circuit put it, "unwarranted inferential leaps." (App. at 7.) Thus, as both the District Court and the Court of Appeals properly concluded after review of the record, even giving Howard the benefit of all reasonable, justifiable inferences, the evidence was insufficient to create an issue of fact for the jury as to whether her speech motivated respondents' actions. (App. at 6-8, 24.)

Despite Howard's attempt to couch this issue as a "conflict in the law," there is no such conflict presented by petitioner's case. What she is really asking this Court to do is to reconsider, in a different context, the sufficiency of the evidence on the causation element of her First Amendment claim, evidence the lower courts found insufficient as a matter of law after review of the record.

In an attempt to create the illusion of a conflict, Howard also improperly relies on cases from other circuits where, unlike this case, the evidence was held sufficient to raise a genuine issue of material fact. Her reliance on these cases is unavailing to present circumstances warranting a writ of certiorari. This is particularly well-illustrated by Howard's reliance on *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), a case she describes as "on all fours" with her own case.

Howard correctly notes that, in *Love-Lane*, the Fourth Circuit reversed a grant of summary judgment against Love-Lane, an African-American assistant principal who was demoted to teacher, concluding that she had raised a genuine issue of material fact as to whether she was demoted in retaliation for engaging in protected speech. Howard has, however, misleadingly described the facts in *Love-Lane* in an effort to match her distorted characterization of the facts in her own case.

According to Howard, "[Love-Lane's] removal was based upon complaints from teachers who took offense at the content of Love-Lane's speech opposing discriminatory practices against African-American and poorer students in her elementary school." (Petition, p. 20.) Howard focuses solely on the alleged actions of the teachers, stating that they banded together against Love-Lane and complained to the principal and the superintendent about their difficulties in working with her, and that, as a result of the complaints, Love-Lane was removed from her position and demoted. Howard notes that the reason given by the superintendent was Love-Lane's poor working relationships with the principal and staff. (*Id.*) Howard omits, however, all the facts present in *Love-Lane* that distinguish it from her own case.

Unlike Howard, who was new to CPS when she was assigned to Lee, Love-Lane had worked for the school district in question for fourteen years as a teacher and for seven years as an assistant principal. She consistently received evaluations of excellent or superior in almost all aspects of her performance, with some of her strongest skills in the areas of

communication and problem solving. In 1995, she was reassigned to Lewisville Elementary School, where she was told by the superintendent, Donald Martin, that "an African-American presence" was needed. An atmosphere of racial tension had existed at Lewisville since principal Brenda Blanchfield, who is white, had taken over. Blanchfield was perceived as ineffective and insensitive in addressing the problems and concerns of African-American teachers, students and parents. *Love-Lane*, 355 F.3d at 769, 771. Lewisville is located in a suburb where it mainly serves middle to upper class white children, but approximately thirty-five percent of the students were poor or working class African-Americans bused in from other areas. Martin acknowledged that there were problems with racial perceptions about Blanchfield and, when Love-Lane expressed concerns about working with Blanchfield, Martin agreed to monitor the situation. *Id.* at 769-70.

As assistant principal at Lewisville, Love-Lane observed discriminatory practices that placed many African-American students at a disadvantage, particularly with regard to disciplinary measures. There was clear evidence that she spoke out repeatedly about these discriminatory practices, and that some of the teachers resented the questions Love-Lane was openly raising about their disciplinary practices. There was clear evidence that she raised these issues with Blanchfield, and that Blanchfield refused to intervene. There was also undisputed evidence that she raised her concerns about Blanchfield and the racially discriminatory practices at Lewisville directly with Superintendent Martin on a number of occasions. Despite his agreement to "monitor" the situation, Martin discounted her concerns about race

discrimination, insisting that she had a personality conflict with Blanchfield that had nothing to do with race. He warned her that she would have no future as an administrator unless she was willing and able to respect the authority of the principal. He also told Love-Lane that it was not her job to worry about the children, it was her job to please her principal. *Id.* at 772-73.

Despite Martin's warnings, Love-Lane continued to voice concerns about race discrimination. Her relationship with Blanchfield continued to deteriorate and teachers complained that she was overbearing, intimidating and unsupportive of their disciplinary practices. Blanchfield gave Love-Lane a lowered evaluation and sent her a memo, also copied to Martin, stating that Love-Lane's continued vocal opposition to certain disciplinary practices showed "blatant disrespect" for Blanchfield. Martin's own assessment of Love-Lane grew more negative as she continued to speak out about discrimination; when she repeated her continuing concerns, Martin told her he did not want to hear about Lewisville. When she nevertheless persisted, he demoted her to a non-administrative teaching position. *Id.* at 781-82. In light of this clear evidence in the record, which was by no means limited to the complaints of teachers, the Fourth Circuit held that the facts, when viewed in Love-Lane's favor, were sufficient to create a genuine issue of material fact as to whether the superintendent demoted Love-Lane because she spoke out against race discrimination in discipline. *Id.* at 774-75.

In contrast with the facts in *Love-Lane*, the evidence in the present case was insufficient to show a

causal relationship between any "protected speech" by Howard and the challenged employment actions. At Lee School, where Howard was initially assigned as principal, a higher percent of the student body was African-American and/or economically disadvantaged than at Lewisville, and the record contains no evidence of an atmosphere of racial tension or discrimination at Lee before Howard arrived. In contrast with *Love-Lane*, the record does not support Howard's claim that she spoke out in the manner or to the extent she claims. Furthermore, many of the statements Howard claims to have made simply reiterate priorities being emphasized by Ritter, Cozette and other principals as part of CPS's literacy plan, improvement program and achievement initiatives. Also unlike Love-Lane, Howard was **not** demoted, despite her own insistence that she was. And unlike the evidence in *Love-Lane*, the evidence in the present case fails to support Howard's conclusory pronouncement that the complaints and concerns expressed by the teachers were "motivated by Howard's speech," rather than by her overall leadership and communication skills and the autocratic manner in which she attempted to manage.

Petitioner erroneously contends that the lower courts failed "to consider the substantial influence the teacher complaints appeared to have on the Respondents as critical evidence that Respondents were motivated by Howard's speech." (Petition at 16.) That is not the case. Rather, the evidence simply failed to establish that Howard's alleged "protected speech" did, in fact, influence, let alone "substantially influence," either the teachers' complaints or the employment decisions made by respondents. There is no evidence beyond petitioner's own self-serving conjecture and

conclusory assertions that respondents' actions were motivated by an intent to retaliate against her. Indeed, when asked during her deposition what evidence she had that Ritter or Cozette were motivated against her because of her speech, she testified only that was her "belief," because in her view there was no other logical explanation for their actions. (See App. pp. 24-25.) Petitioner's unsupported personal belief, no matter how firmly held, is not evidence of causation.

The remainder of the cases from the other circuits on which Howard relies can be similarly distinguished. The present case does not demonstrate a conflict between the circuits on a question of law. Howard's petition reflects nothing more than a party who is unhappy with the lower courts' determination that her evidence was insufficient to establish a genuine issue of material fact for the jury and who is desperate to find an issue worth further review.

C. This Case is Distinguishable From and Unrelated to *Hill v. Lockheed Martin Logistics Management, Inc.*

In her petition, Howard states that "[t]his issue is similar to and related to the Petition for Writ of Certiorari in *Hill v. Lockheed Martin Logistics Management, Inc.*, Case No. 03-1443, which is pending before this Court," and that the "conflict of law" in this case is the same conflict as in *Hill*. That is inaccurate. As set forth above, the Eighth Circuit's opinion in this case does not in any way establish a conflict with other circuits on the issue she seeks to present. Moreover, this case is readily distinguishable from *Hill* in a number of crucial respects.

First, *Hill* is a mixed-motive employment discrimination case, in which the issue was age and gender discrimination. There was direct evidence that an individual named Fultz, who took affirmative actions that were instrumental in Hill's dismissal, was hostile towards Hill because of her age and gender. The legal issue squarely presented to the Fourth Circuit was whether liability could be imposed on the employer under a mixed-motive analysis where it could be shown that a subordinate (Fultz), who allegedly harbored discriminatory animus, substantially influenced the adverse employment action taken against Hill. *Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.2d 277(4th Cir. 2004)(en banc). The en banc Fourth Circuit concluded that it was not enough to show "substantial influence;" rather, it was necessary to show that the subordinate was the one "principally responsible" for, or the "actual decision maker" behind, the adverse employment action. The Court of Appeals based its conclusion that this is the appropriate standard on the language of the discrimination statutes and decisions of this Court, in particular *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 151-52 (2000). *Id.* at 288-89.

Unlike *Hill*, the legal issue Howard now seeks to assert was neither squarely presented to the Eighth Circuit for its consideration, nor was it decided by the courts below. Unlike *Hill*, there was no direct evidence of animus because of Howard's "protected speech," nor could such an inference reasonably be drawn from the circumstantial evidence. Unlike *Hill*, the present case is not an employment discrimination case arising out of the discrimination statutes. It involves a First Amendment claim, and, in that context, this Court has

long held that a plaintiff's protected speech must be shown to be a "substantial or motivating factor" in the challenged decision. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Thus, it is significant and telling that *Love-Lane*, the case Howard contends is on "all fours" with her case and which involved a First Amendment issue, was decided by the Fourth Circuit after it decided *Hill*, yet the Fourth Circuit does not cite *Hill* in *Love-Lane*.[4]

Other circuit courts addressing agency principles in the employment discrimination context have reached somewhat varying conclusions with respect to who can be considered a relevant decision maker and the degree of influence they must exert over the challenged employment decision in order to impute liability to the employer, *e.g.*, whether that influence must be "enormous" or "substantial" or whether it is sufficient if the person who is shown to have discriminatory animus is "closely linked with" or "tainted" the challenged employment decision, or whether they must be the actual decision maker. *See Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657, 666-668 and fn 4 (4th Cir. 2003) and cases cited therein. But even if the analysis in *Hill* has any relevance to First Amendment claims, *Hill's* recognition of the possibly

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[4] Similarly, the Eighth Circuit cases cited by the en banc Fourth Circuit in *Hill* and by Hill in her petition to this Court are employment discrimination cases, not First Amendment cases. *Hill*, 354 F.3d at 290 (citing *Kramer v. Logan County School District No. R-1*, 157 F.3d 620 (8th Cir. 1998), a Title VII gender discrimination case), Hill Petition for Writ of Certiorari, p. 16-17 (citing *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993), a Title VII sex discrimination case, and *Jiles v. Ingram*, 944 F.2d 409 (8th Cir. 1991), a Title VII race discrimination case).

varied standards of causation remains unavailing to Howard. The evidence presented by Howard simply fails to satisfy **any** of the standards discussed in *Hill*. As the courts below held, Howard did not present any evidence of causation and no reasonable inference could be drawn from the record that Howard's speech was a motivating factor in the challenged employment decisions.

In short, this case is not, as petitioner suggests, "directly related to" or "similar to" *Hill* and, regardless of the disposition in *Hill*, Howard's belated attempt to embrace the issue raised by Hill in her petition does not warrant review by this Court in Howard's case. Howard should not be permitted to reformulate the issues and reargue the record because she thinks she has found another case, involving different issues and facts, in which this Court may have expressed some interest.

II. The Eighth Circuit Correctly Held that Petitioner's Evidence Failed to Give Rise to a Reasonable Inference that any "Protected Speech" by Petitioner Motivated the Employment Decisions About Which She Complains, and that Her Claims were Insufficient as a Matter of Law to Create a Genuine Issue of Material Fact

In the second question Howard purports to present for review, she again attempts to characterize the Eighth Circuit's decision on her First Amendment claim as being in direct conflict with decisions of other circuits and with other decisions of the Eighth Circuit on the issue of causation. The present case does not,

however, demonstrate a conflict between the circuits on a question of law or a conflict with prior Eighth Circuit opinions. Once again, Howard is really only challenging whether the evidence is sufficient to create a triable question on the issue of whether her speech was a substantial or motivating factor in the employment actions in question. Once again, this case involves nothing more than a party who is disappointed that the lower courts granted summary judgment in favor of respondents, and who now seeks to recast her case as one involving a certiorari-worthy conflict among circuits. This case presents no issue warranting certiorari under this Court's Rule 10.

That this is merely a "sufficiency of the evidence" issue is illustrated by Howard's insistence that the lower court "disregarded her evidence as to the extent her speech played" in the actions taken against her because

> [t]he lower court's decision did not address the issue of motivation raised by Dr. Howard, that is, that Respondent's (sic) reasons for the adverse employment actions were inextricably linked to Dr. Howard's speech.

(Petition at 25.) In short, she relies on the issue obliquely raised for the first time in her reply brief, and repeats her belated, bald and completely unsupported contention that her speech was "inextricably linked" to the challenged employment actions, without pointing to any evidence establishing that alleged link. The courts below did not "disregard" her evidence; they did not decline or refuse to consider "the extent a plaintiff's speech played in the adverse employment decision."

(Petition at 26.) Rather, beyond Howard's own bare pronouncement that an inextricable link existed, the evidence simply was not there.

Contrary to Howard's assertion, the Eighth Circuit did not "grossly misapply" the standards this Court has set out for reviewing evidence for summary judgment purposes. It properly reviewed the record, considered the evidence presented, and found none to support the causation element of Howard's First Amendment claim. It correctly held, as a matter of law, that there is no genuine issue for trial, *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); thus, summary judgment was appropriate because Howard failed to establish the existence of a genuine issue of material fact with respect to an essential element of her claim. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). [5]

Petitioner's reliance on cases from other circuits and prior decisions from the Eighth Circuit where, unlike this case, the evidence **did** establish genuine issues of material fact with respect to the employer's motive, are completely unavailing to show error or any

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[5] Contrary to Howard's contention, this Court did not hold in *Hunt v. Cromartie*, 526 U.S. 541 (1999), that it is necessarily "error for the lower court to resolve the issue of motivation and intent at the summary judgment stage." (Petition at 29.) This Court stated only that "it was error in [that] case" because of the disputed record before the Court. This Court added that "[w]e can imagine an instance when the uncontroverted evidence and the reasonable inferences to be drawn in the nonmoving party's favor would not be 'significantly probative' so as to create a genuine issue of fact for trial." *Id.* at 553 (quoting *Anderson*, 477 U.S. at 249-50). This is just such a case.

"direct conflict" warranting review by this Court. Indeed, Howard's citation to and reliance on the Eighth Circuit's decisions in *Stever*, *Roberts* and *Patterson*, where, in contrast with this case, the plaintiffs presented sufficient evidence to create a genuine issue of fact on causation, underscores that this case is about the sufficiency of the evidence, not the Eighth Circuit's alleged "failure to follow its own precedent," or any conflict or misapplication of the law.

Howard's claim that this Court did not address in *Mt. Healthy City School District Board of Education v. Doyle* the questions she purports to present in this petition does not change the fact that there is nothing certiorari-worthy about this case. Even assuming, *arguendo*, that these "evidentiary questions" (Petition at 28) actually require further clarification, it would be unavailing to Howard. Regardless of whether summary judgment can be granted when the employee's speech is inextricably linked to an adverse employment action, (*id.*) there is no evidence of any such link in Howard's case. Similarly, regardless of whether liability can attach to an employer when a "prejudiced subordinate's influence plays a substantial role in the actual decision maker's decision to take adverse employment action" (*id.*), there was no evidence of such prejudice or substantial influence in this case. Rather, this is just another attempt by Howard to suggest that a question of law exists, when the issue is really that the evidence she presented was insufficient under any suggested standard to create a material fact question on an essential element of her First Amendment claim.

CONCLUSION

For all the reasons set forth above, Howard's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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